

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
STEPHEN AND Nanci FISHER	:	DETERMINATION
	:	DTA NO. 806534
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income Tax	:	
under Article 22 of the Tax Law and the Administrative	:	
Code of the City of New York for the Years 1977 and 1984.	:	

Petitioners, Stephen and Nanci Fisher, 2040 Polk Street, San Francisco, California 94109, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1977 and 1984.

A hearing was commenced before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 19, 1997 at 9:15 A.M., and was continued to conclusion before the same Administrative Law Judge on June 20, 1997 at 9:15 A.M., with all briefs to be submitted by October 14, 1997. The briefing schedule was extended twice so that all briefs were to be submitted by January 5, 1998. Stephen Fisher appeared *pro se* and on behalf of Nanci Fisher. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Kathleen Dix, Esq., of counsel).

On September 29, 1997, petitioner Stephen Fisher filed a motion for a new hearing on the ground that Administrative Law Judge Faulkner had left her employment with the Division of Tax Appeals and thus would be unavailable to render a determination in this matter. Petitioners

sought a hearing before the successor Administrative Law Judge. Petitioners' motion for a new hearing was denied by an Order dated January 29, 1998. The Order provided that all briefs in this matter were to be filed by May 1, 1998,¹ which date commenced the six-month period for the issuance of this determination (Tax Law § 2010[3]). After due consideration of the entire record, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether petitioners have established that the entire amount of business expenses claimed on a Schedule C filed with their 1977 personal income tax return should be allowed, in turn resulting in allowance of the full amount of overpayment (refund) claimed by petitioners but denied upon audit by the Division of Taxation.

II. Whether petitioners properly calculated their personal income tax liability for the year 1984.

III. Whether petitioners have established grounds sufficient to warrant abatement of a penalty imposed against them for late filing of their 1984 personal income tax returns.

IV. Whether the Division of Taxation has properly allowed and accounted for all available overpayments of tax by petitioners for the years 1977 through 1988 as credits against petitioners' outstanding liabilities.²

¹The briefing schedule previously set was suspended during the pendency of the motion for a new hearing.

²The terms "overpayment" and "refund" have been used somewhat interchangeably throughout the documents in this case. For purposes of clarity, the term "overpayment" refers to the situation where, in any given year, petitioners' payments (by withholding or otherwise) exceeded their tax liability for such year. A "refund", in contrast, can result from an overpayment if an overpayment is not otherwise utilized as a setoff or credit against a tax liability or is not utilized as an estimated payment against a future tax liability.

FINDINGS OF FACT³

1975 THROUGH 1978

1. Petitioners, Stephen and Nanci Fisher, were residents of New York from at least 1975 through part of 1984. The Division of Taxation (“Division”) conducted an audit of petitioners’ tax liability for the years 1975 through 1978. For each of these years, petitioners’ returns were filed late. More specifically, petitioners’ 1975 return was not filed until March 21, 1980, petitioners’ 1976 return was not filed until January 23, 1979, petitioners’ 1977 return was not filed until August 16, 1978, and petitioners’ 1978 return was not filed until March 21, 1980. The Division’s audit resulted in the following findings for the years under audit:

<i>YEAR</i>	<i>FINDING</i>
1975	Additional tax due in the amount of \$4,485.09, plus penalties for failure to file a timely return and pay tax due.
1976	Tax due in the amount of \$4,394.70, as set forth on petitioners’ return for such year, plus penalties for failure to file a timely return and pay tax due.
1977	Disallowance of claimed Schedule C business expenses resulting in disallowance of a portion of petitioners’ claimed overpayment and refund of \$1,310.10, thus leaving a reduced overpayment (refund) in the amount of \$205.88.
1978	No tax due and no overpayment by petitioners.

2. For 1975, the Division advised petitioners of its audit result by issuing a Statement of Audit Changes dated May 2, 1978. This statement was followed by a Notice of Deficiency dated August 10, 1978, asserting additional tax due in the amount of \$4,485.09, plus penalties under

³Although the only years directly in issue are 1977 and 1984, it becomes necessary to discuss other years in order to provide some perspective and to assess any possible impact on the years in question by reason of the application of overpayments from such other years against petitioners’ liabilities.

Tax Law § 685(a)(1) and (2) for late filing of a return and late payment of tax, respectively, and interest.

For 1976, the \$4,394.70 amount of tax due per the Division's audit was the same amount of tax shown as due and deemed self-assessed by petitioners upon their late-filed return for 1976. Such amount, consisting of New York State tax (\$3,566.15) and New York City tax (\$828.55), plus penalties as above for late filing and late payment, and interest, was reflected on two notices and demands for payment issued to petitioners on July 3, 1980.

For 1977, the audit disallowance of a portion of petitioners' claimed overpayment and refund did not result in an underpayment or deficiency of tax, but rather left a reduced overpayment of \$205.88. Hence no Notice of Deficiency was issued for 1977.

For 1978, the audit resulted in no underpayment or overpayment of tax, and hence no Notice of Deficiency was issued.

3. By a letter dated June 13, 1980, petitioners challenged the Division's audit findings for 1975 through 1978, including most specifically the overpayment (refund) reduction for 1977 and the imposition of penalties for 1975 and 1976. With specific regard to the business expense disallowance for 1977, petitioners' letter stated:

[expenses for] a consulting business were eliminated (1977) in the audit. That company (Fisher Associates) survives today. Although there was no income (1977) the business expenses were real (such as stationery, telephone, travel) etc. This year (1980) there was some income (from Fisher Associates) and the same expenses. Because my business was a failure in 1977, I do not believe it is fair to further penalize me for eliminating real expenses paid for doing business.

1975

4. The \$4,485.09 deficiency asserted for 1975 was based on information taken from petitioners' Federal income tax return for such year, and followed petitioners' failure to file a New York State income tax return for 1975 and their failure to respond to inquiry letters sent by the Division. However, this asserted deficiency was reduced by the Division to \$659.89 upon petitioners' March 21, 1980 submission of a photocopy of a joint New York State income tax return for 1975 including attached wage and tax statements.

5. As the result of a prehearing conference held on January 23, 1981, the Division's reduction of the amount of tax asserted as due for 1975, from \$4,485.09, plus penalty and interest, to \$659.89, plus penalty and interest, was confirmed. In turn, petitioners continued their challenge to the (reduced) deficiency for 1975, and were advised that the matter would be scheduled for a small claims hearing.

6. After the January 23, 1981 prehearing conference, petitioners filed a perfected petition dated August 24, 1981, protesting all of the audit years 1975 through 1978. This petition raised no specific substantive grounds in challenge to the additional tax asserted as due for 1975, or to the tax assessed as due for 1976, but rather specifically challenged the 1977 refund reduction and the imposition of penalties. Petitioners sought the full overpayment (refund) claimed on their 1977 return, and requested that such overpayment "be applied and other years' deficiencies and penalties adjusted." On October 20, 1981, the Division filed its answer to this perfected petition, asserting that the Notice of Deficiency for 1975 (as reduced) was correct, and that because notices of deficiency had not been issued for any year other than 1975, there was no jurisdiction to address any of the other audit years.

7. A small claims hearing was held on January 19, 1982 concerning petitioners' challenge

for the year 1975. By a decision of the former State Tax Commission dated December 14, 1982, the Notice of Deficiency issued against petitioners for the year 1975, reduced in amount to \$659.89, plus penalties and interest, was sustained. This decision was specifically limited to the year 1975, on the basis that since no notices of deficiency had been issued for any of the other audit years, there was no jurisdiction to address such years. It is undisputed that no timely appeal was taken from this December 14, 1982 decision.

1977

8. For 1977, petitioners claimed (on their return) that they had overpaid their taxes and were entitled to a refund in the amount of \$1,301.10. In this regard, petitioners claimed a loss on such return with respect to a business called Fisher Associates. The specific business expenses giving rise to the claimed loss totaled \$5,675.00, and appeared on Federal Schedule C ("Profit or [Loss] From Business or Profession") filed with petitioners' 1977 New York State return. This Schedule C listed petitioner Steven Fisher as the business proprietor, reflected "business consultant" as the principal business activity, "administration" as the product, and "Fisher Associates" as the business name. The Schedule C listed business addresses in New York, New York, and in Cannes, France, listed "none" as total (business) income, and included the following claimed expenses:

Rent on business property	\$ 810.00
Travel-airline	1,555.00
Lodging	724.00
Entertainment and gifts	1,215.00
Printing and Stationery	292.00
Telephone	398.00
Office supplies	194.00
Postage	77.00
Auto Rental	140.00
Transportation-train and taxi	230.00
Professional dues and subscriptions	<u>40.00</u>

Total	<u>\$5,675.00</u>
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9. The Division, on audit, disallowed petitioners' claimed Schedule C business expenses for 1977 and, as a result, recomputed and reduced the amount of petitioners' claimed overpayment for such year. By a notice of disallowance letter dated April 1, 1981, apparently in response to petitioners' June 13, 1980 letter challenging the audit results (*see*, Finding of Fact "3"), the Division notified petitioners that their allowable refund for 1977 was reduced from \$1,301.10, as claimed, to \$205.88. According to the Division's audit report attachment Form AU 251.1, dated July 7, 1980, the claimed expenses were disallowed because the business showed no income and did not claim any service was rendered, had no business cards, had no list of prospective customers and hence no profit motive, had no professional status, and did not disclose the associates in the business.

10. Petitioners challenged the 1977 refund reduction by filing a petition. This petition, dated May 31, 1981 and apparently filed in response to the Division's April 1, 1981 refund disallowance letter, was received by the Tax Appeals Bureau of the former State Tax Commission on June 2, 1981. Petitioners also filed a claim for credit or refund of personal income tax with respect to 1977, which claim was received by the Division on or about January 22, 1982.

11. By a letter dated April 12, 1982, petitioners were advised that a prehearing conference on their 1977 refund reduction challenge was scheduled for May 12, 1982 at 2:45 P.M. However, petitioners did not appear at this scheduled prehearing conference, and a default order (Order No. 82-C-40) was issued against petitioners on January 14, 1983. Following additional ongoing correspondence between the parties, petitioners received an October 23, 1987 letter from

the Division's former Director of Litigation advising that the Division would not oppose a request by petitioners to vacate the default order. Thereafter, upon petitioners' January 14, 1988 application, the default order was vacated and a conciliation conference was scheduled for June 1, 1988 with the Division's Bureau of Conciliation and Mediation Services ("BCMS"), the successor to the former Tax Appeals Bureau's prehearing conference unit.

12. The conciliation conference was held as scheduled on June 1, 1988. As a result of this conference, the Division conceded that petitioners had provided substantiation with respect to \$2,800.00 of their claimed Schedule C business expenses. On this score, the June 1, 1988 conference report states that "TP [Taxpayer] presented additional substantiation for expenses deducted on TP's [Taxpayers'] Schedule C." Accordingly, on the basis of the \$2,800.00 of expenses substantiated, the Division's conciliation conferee recalculated and increased petitioners' overpayment for 1977 by \$540.00, thus increasing the overpayment amount from \$205.88, as originally determined on audit, to \$745.88. A conciliation order (Order No. 34013) dated November 4, 1988 was issued to petitioners notifying them of the recalculation of the amount of overpayment (refund) for 1977.

1979 THROUGH 1983

13. Based on the evidence submitted at hearing, and in accordance with petitioners' tax returns or transcripts of the contents thereof, for the years 1979 through 1983 there appears to be no dispute between the parties that petitioners:

- a) overpaid their tax liability for 1979 by the amount of \$57.00 and were entitled to a refund or credit for such amount.
- b) overpaid their tax liability for 1980 by the amount of \$874.00 and were entitled to a refund or credit for such amount.

c) overpaid their tax liability for 1981 by the amount of \$1,010.00 and were entitled to a refund or credit for such amount.

d) overpaid their tax liability for 1982 by the amount of \$151.00 and were entitled to a refund or credit for such amount.

e) overpaid their tax liability for 1983 by the amount of \$155.00 and were entitled to a refund or credit for such amount.

1984

14. On or about October 15, 1986, petitioners filed a New York State Resident Income Tax Return (Form IT-201) and a New York State Nonresident Income Tax Return (Form IT-203) for 1984. According to these returns, petitioners were residents of New York through July 31, 1984, and were nonresidents of New York for the balance of such year. Wage and tax statements attached to petitioners' 1984 returns reflect petitioners' address as 115 Field Point Road, Greenwich, Connecticut 06830 and, accordingly, it is presumed that petitioners claimed their change of residence in 1984 was to Connecticut.

15. On their 1984 returns petitioners computed their New York taxable income, and their tax liability, for the separate periods covered by such returns, and then combined the result to arrive at a claimed overpayment and refund due for 1984 in the amount of \$282.00. The Division, however, recalculated petitioners' tax liability for 1984 by totaling the amount of New York taxable income determined on each of petitioners' two returns (resident and nonresident) and computing the tax liability on such combined amount of New York taxable income. This method of computation resulted in a higher tax liability than under petitioners' computational method, where the tax was computed separately on the two separate amounts of New York taxable income. Specifically, the Division calculated a tax liability for 1984 in the amount of \$168.82 and denied petitioners' claimed overpayment and refund for such year in the amount of

\$282.00. In addition, since petitioners' 1984 return was filed some one and one-half years after its due date, the Division imposed a late filing penalty (per Tax Law § 685[a][1]), and interest.

16. By a Statement of Audit Changes dated March 11, 1987, including calculations, the Division provided petitioners with an explanation of the additional tax, penalty and interest asserted for 1984 as follows:

[a]n error was made when you calculated New York State tax on your return. Since you had taxable income on both of your part-year returns, you should have calculated the tax on the sum of the taxable income from the two (2) returns. (Section 654(d) of the New York State Tax Law).

Section 685(a)(1) penalty for late filing has been imposed on your tax liability.

By a subsequent Notice of Deficiency dated December 7, 1987, the Division notified petitioners of its assertion of tax, penalty and interest due for 1984.

17. Petitioners challenged the Division's Notice of Deficiency and calculation for 1984, stating that they were in fact owed a refund for such year. A conciliation conference was held by the Divisions' BCMS on June 1, 1988. Thereafter, on November 4, 1988, conciliation order No. 84862 was issued sustaining the Division's calculation of tax liability and its Notice of Deficiency for 1984, including penalty and interest.

18. Petitioners challenged both of the November 4, 1988 conciliation orders pertaining, respectively, to 1977 and 1984, by filing a petition dated January 27, 1989. Petitioners sought the full overpayment (refund) claimed on their 1977 return (i.e., \$1,301.10), and alleged that the conciliation conferree did not consider all of the evidence for such year regarding petitioners' claimed business expenses. For 1984, petitioners alleged that the Division did not properly calculate their tax liability, and that petitioners are owed a refund for such year. In addition, petitioners complained, in their petition, as to the passage of time in resolving these matters.

19. Petitioners followed their January 27, 1989 petition with a February 13, 1989 amended petition which repeated the claims set forth in the January 27, 1989 petition and specifically requested, in newly added paragraph “7”, the following:

Interest on all late refunds paid to petitioner -plus- refunds owed to petitioner must be paid/credited so that N.Y. state can provide a true accounting . . . past penalties must be offset > if petitioner is penalized for late payment of taxes; N.Y. State must be penalized for much later payment of refunds.

20. A hearing before the Division of Tax Appeals on the January 27, 1989 petition and the February 13, 1989 amended petition was scheduled for December 14, 1989. Prior thereto, by a letter dated August 14, 1989, petitioners requested the issuance of subpoenas for certain individuals then currently or formerly employed by the Division, and one individual employed in the Office of the Attorney General. The requested subpoenas were issued by the Division of Tax Appeals.

21. By a motion received by the Division of Tax Appeals on November 27, 1989, the Division requested that the subpoenas be quashed, withdrawn or modified. By a responding letter from the Division of Tax Appeals dated November 29, 1989, the Division was advised that its application to quash, withdraw or modify the subpoenas would be ruled on at the December 14, 1989 scheduled hearing. Petitioner Stephen Fisher and the Division appeared at the scheduled December 14, 1989 hearing, and argument was heard on the Division’s motion to quash, withdraw or modify the subpoenas. The Administrative Law Judge then assigned to the matter declined to rule on the motion on the basis that he lacked the authority to vacate, modify or enforce the subpoenas, and instead referred the parties to Supreme Court for resolution of the status of the subpoenas and adjourned the hearing pending resolution of the subpoena issue. The underlying substantive merits of the case were not addressed. While these events transpired, the

Assistant Attorney General who had been subpoenaed brought a motion, returnable January 10, 1990 in Supreme Court, New York County, to quash the subpoena issued to him.

22. On January 10, 1990, the Division filed an exception to the Administrative Law Judge's determination that he did not have the power to vacate or modify the subpoenas, and requested that the Tax Appeals Tribunal order all of the subpoenas withdrawn.⁴ On April 19, 1990, the Tribunal issued its decision holding that the Administrative Law Judge had authority to rule on the Division's motion to quash, modify or withdraw the subpoenas, and that the Tribunal had authority to rule on the Division's exception to the Administrative Law Judge's determination not to address the motion to quash, withdraw or modify. The Tribunal went on to rule on the Division's motion, ordering withdrawal of all of the subpoenas except for that issued to the individual having information concerning the impact of the Division's application of any previously granted refunds for tax year 1977 (*see, Matter of Fisher*, Tax Appeals Tribunal, April 19, 1990; *rearg denied* June 9, 1990; *petition dismissed* 177 AD2d 801, 576 NYS2d 415, *appeal dismissed* 79 NY2d 914, 581 NYS2d 666, *lv denied* 80 NY2d 751, 587 NYS2d 287).

23. Following additional correspondence between the parties, petitioner Stephen Fisher filed an amended petition, dated November 15, 1996, arguing that the Division erroneously denied the full overpayment (refund) claimed on petitioners' 1977 New York State Income Tax Resident Return (Form IT-201/208); that the business expenses claimed by petitioners on Schedule C of such return were improperly denied by the Division; that the Division owes petitioners refunds that were not calculated into the Division's Consolidated Statement of Tax Liabilities dated June 14, 1996 concerning petitioners' income tax liability for 1984; and that the

⁴ The motion to quash in Supreme Court, New York County, was held in abeyance pending the Tribunal's decision of the Division's exception.

Division's claim for interest on petitioners' outstanding liabilities should be canceled because the Division had not paid interest on unpaid refunds owed to petitioners. More specifically, petitioners claimed that the Division owed petitioners an unpaid refund of \$1,155.27 (\$1,010.00 plus interest) based on petitioners' 1981 tax return, as well as a refund of \$874.00 for 1980 which had not been credited against petitioners' liabilities until 1987 and upon which petitioners had received no interest.

24. The Division filed an amended answer, dated February 5, 1997, denying that the Division owed petitioners refunds that were not calculated into their 1984 tax liability and denying knowledge or information sufficient to form a belief as to the truth of petitioners' allegations that the \$874.00 refund was credited to petitioners' tax liabilities in 1987 with no interest paid, and that an \$1,155.00 refund for 1981 was not paid to petitioners or credited against petitioners' tax liabilities. The Division affirmatively stated that Tax Law § 685 requires that penalties be assessed for failure to timely file a tax return or to pay the tax shown as due on a return unless it is established that such failures were due to reasonable cause and were not due to willful neglect, and that petitioners have not met their burden of establishing reasonable cause and the absence of willful neglect for failure to timely report and pay taxes for 1984.

25. At the hearing held in these proceedings on June 19 and 20, 1997, petitioner Stephen Fisher stated that he thought the entire amount of claimed Schedule C business expenses for 1977 had been allowed as the result of the conciliation conference. However, he also stated that it appears, in fact, only approximately half of such expenses were allowed, and that he did not know which specific expenses were accepted and which remained disallowed. The record contains no evidence from petitioners in substantiation of any of the claimed expenses. In fact, both petitioners' post-hearing submission (denominated the "Fisher Report"), and the Division's

Exhibit “EE” (denominated the “Eckler Report”), reflect the \$745.88 amount determined at the conciliation conference as the amount of overpayment by petitioners for the year 1977.

26. Petitioner Steven Fisher also appeared to concede, at the hearing, that petitioners erred in computing their liability for 1984. Notwithstanding this seeming concession, however, petitioners’ post-hearing submission of the Fisher Report indicates a claim for \$282.00, the amount of overpayment (refund) calculated by petitioners on their returns for 1984. The Fisher Report and petitioners’ post hearing brief and reply brief offer no explanation concerning this apparent inconsistency, nor any specific basis in support of petitioners’ method of tax calculation as opposed to the Division’s method of tax calculation for 1984. In any event, however, petitioners clearly did not concede and continue to contest the imposition of penalties for 1984. Petitioners offered no specific reason for the late filing of their returns for 1984. However, petitioners noted that any calculation error on their part for such year would have been the result of inadvertent mistake, and again maintained that penalties should be abated based on the Division’s lateness in crediting overpayments or paying refunds and, alternatively, that if such penalties are not abated the Division should, like petitioners, be penalized for such lateness.

1985 THROUGH 1988

27. For 1985, the Division indicates an overpayment by petitioners, and hence a refund due, in the amount of \$26.28. In contrast, petitioners’ Fisher Report claims a greater overpayment and refund due in the amount of \$226.00. For 1986, there appears to be no disagreement that petitioners’ liability per their return was paid, leaving no balance due and no overpayment. For 1987, the Division indicates an overpayment in the amount of \$81.77. Petitioners’ Fisher Report provides no claim or information with regard to 1987 and, in the absence of any contrary evidence or claim, it is assumed that petitioners are in fact entitled to the

overpayment indicated by the Division. Finally, for 1988, the Division indicates an overpayment, and hence a refund due, in the amount of \$297.00. Petitioners' Fisher Report claims, in contrast, a higher overpayment and refund due in the amount of \$2,297.00.

28. In summary of the foregoing, the Division claims that petitioners:

- a) owed additional tax for the years 1975, 1976 and 1984;
- b) paid the correct amount of tax (or had no tax due) and made no overpayment for the years 1978 and 1986, and;
- c) overpaid their tax liability for the years 1977, 1979, 1980, 1981, 1982, 1983, 1985, 1987 and 1988.

29. In contrast, petitioners apparently agree (at this stage of the proceedings) with the tax liability amounts for the years 1975 and 1976, with the fact that there was no tax due nor any overpayment or refund due for the years 1978 and 1986, and with the dollar amounts of the overpayments shown by the Division for the years 1977, 1979, 1980, 1981, 1982 and 1983. As noted, petitioners offered no evidence or argument against the Division's information showing an overpayment of \$81.77 for 1987. Finally, neither party has presented any information regarding refunds or other claims beyond 1988, and petitioners specifically stated that there have been no problems after 1988.

30. Following correspondence between the parties, this matter was scheduled and came on for hearing on June 19, 1997 and was continued and concluded on June 20, 1997. At such hearing, the Division presented two witnesses and submitted some 31 documents as exhibits, including Exhibit "EE" referred to as the Eckler Report. This report was prepared by one of the Division's witnesses (Theodore Eckler), at the request of Administrative Law Judge Faulkner, as a detailed summary and explanation of the Division's accounting and calculations underlying its position in this case vis-a-vis the amounts of petitioners' outstanding liabilities and the amounts

and applications of petitioners' overpayments against such liabilities. Petitioners, in turn, submitted some 18 exhibits, all of which except for Exhibits "3", "11", "13" and "14" were encompassed within two volumes together constituting Exhibit "18" and denominated "Evidence Book I" and "Evidence Book II". At hearing, each party was afforded the opportunity to submit evidence and to challenge the evidence offered by each other's respective opponent, including the opportunity to cross examine the witnesses. Finally, petitioners were afforded the opportunity, post-hearing, to submit their own accounting and calculations in contrast to the Division's accounting set forth in the Eckler Report. Petitioners in fact have submitted such an accounting, known as the Fisher Report.

31. Where the parties differ, and what is in contest in this proceeding, is the following:

- a) Whether petitioners have established entitlement to any amount of overpayment for 1977 in excess of the \$745.88 amount determined as a result of the June 1, 1988 conciliation conference.
- b) Whether the Division correctly recalculated petitioners' tax liability for 1984, thus eliminating petitioners' claimed \$282.00 overpayment and resulting in a tax liability of \$168.82 for such year.
- c) Whether penalties for late filing and late payment imposed by the Division on the tax liabilities calculated for each of the years 1975, 1976 and 1984 should be eliminated based on the Division's alleged late crediting of overpayments (or late payments of refunds) owed to petitioners and, for 1984, whether penalty should be eliminated based on reasonable cause excusing petitioners' late filing of returns for such year.
- d) Whether petitioners have established their claim of an overpayment in the amount of \$226.00 for the year 1985, as opposed to the amount of \$26.28 allowed by the Division for such year.
- e) Whether petitioners have established their claim of an overpayment in the amount of \$2,297.00 for the year 1988, as opposed to the amount of \$297.00 allowed by the Division for such year.
- f) Whether the Division's method of crediting overpayments by petitioners against petitioners' outstanding liabilities improperly deprives petitioners of interest due on such overpayments.

g) Whether petitioners have been denied due process of law because the hearing in this matter was not postponed to a date other than June 19, 1997 and, thereafter, because petitioners were not granted a new hearing as requested in their September 29, 1997 motion.

h) Whether petitioners have been denied equal protection under the law based on the imposition of penalties against them for late filing and late payment, without concomitant imposition of penalties against the Division for alleged late crediting of overpayments against petitioners' outstanding liabilities.

ACCOUNTING AND APPLICATIONS OF REFUNDS

32. The Division's accounting of petitioners' liability as of the June 20, 1997 hearing date, reflects a total amount due of \$19,839.24, and is set forth in Exhibit "EE", denominated the Eckler Report. This calculation commences with petitioners' liability for 1975, and continues through to include the impact of underpayments and overpayments for ensuing years through 1988. In contrast, petitioners' accounting of their liability as of the June 20, 1997 hearing date totals ("at most") \$806.00, is denominated the Fisher Report, and is included as part of petitioners' post-hearing submission. This calculation also starts with petitioners' liability for 1975, and continues through to include the impact of underpayments and overpayments for ensuing years through 1988. Because of the differences in these accountings, it is helpful to reproduce the same hereafter, verbatim, together with interspersed explanatory Findings of Fact in order to facilitate comparison and highlight the differences between the two. For clarity, the explanatory Findings of Fact are single spaced and are presented in italics.

33. *THE ECKLER REPORT*

1975 Tax Due	\$ 659.89
Penalties	230.97
Interest from 4/15/76 to 4/15/78	<u>112.19</u>
Total Due 4/15/78	\$ 1,003.05

Less: 1977 Overpayment ⁵ (corrected) (4/15/78) ⁶	<u><745.88></u>
Balance due after 1977 overpayment	\$ 257.17
1978 No tax due/No overpayment (4/15/79)	<u>0</u>
Balance 4/15/78	\$ 257.17
Less 1979 overpayment (4/15/80)	<u><57.00></u>
Balance after 1979 overpayment	\$ 200.17
Total 1975 due 4/15/81	200.17
Less 1980 overpayment (4/15/81)	<u><874.00></u>
Balance after 1980 overpayment	\$ <u><673.83></u>

34. The foregoing information reflects that the Division has applied overpayments for the years 1977, 1979 and 1980, the amounts of which are not in dispute, against the outstanding liability, including penalties and interest, owed by petitioners for the year 1975. The Division has computed interest on the 1975 tax liability only (prior to 9/1/83, interest accrued only on outstanding tax liability, and not on penalties or interest) for the period from the due date for petitioners' 1975 return (4/15/76) through to the due date for petitioners' 1977 return (4/15/78), at which point petitioners' \$745.88 overpayment for 1977 (determined as the result of the June 1, 1988 conciliation conference) is credited. This overpayment credit eliminates the tax liability for 1975, thus eliminating the accrual of further interest charges on such liability and leaves unpaid, for the 1975 tax year, only penalties and interest. The Division's method of accounting continues in the same manner to apply petitioners' overpayments for 1979 and 1980 against their remaining liability for 1975, consisting of penalties and interest, until such liability has been satisfied. The Division then, as detailed hereafter, applies the remaining 1980 overpayment amount (\$673.83) against petitioners' next outstanding liability, i.e., the amount due for 1976. In sum, overpayments for the years 1977, 1979 and 1980 are being applied to petitioners' liabilities, including penalties and interest, outstanding for the earlier years 1975 and 1976, as opposed to such overpayments being paid over as refunds to petitioners.

1976 Tax Due	\$ 4,394.70
Penalties	1,845.78
Interest on \$4,394.70 from 4/15/77 (due date of return) to 4/15/81 (date of 1980 overpayment the first date an overpayment was applied to this liability)	<u>1,493.94</u>
Total 1976 due 4/15/81	\$ 7,060.59
Interest 4/15/81 to 4/15/82 on \$3,720.87 (tax only)	<u>451.83</u>

⁵Refunds due to the taxpayer are referred to as "overpayments" in this analysis.

⁶All overpayments (refunds) are credited as of April 15th of the year the return was due, regardless of whether the petitioners requested an extension or late filed the return.

Total 1976 due 4/15/82	\$ 7,512.42
Less 1981 overpayment (4/15/82)	<u><1,010.00></u>
Balance after 1981 overpayment	\$ 6,502.42
Interest from 4/15/82 to 4/15/83 on \$2,710.87 (tax only)	<u>350.95</u>
Total 1976 due 4/15/83	\$ 6,853.37
Less 1982 overpayment	<u><151.00></u>
Balance after 1982 overpayment	\$ 6,702.37
Interest 4/15/83 to 8/31/83 on \$2,559.87 (tax only)	<u>88.06</u>
Total 1976 due 8/31/83	\$6,790.43
Interest 9/1/83 to 4/15/84 ⁷	<u>401.69</u>
Total 1976 due 4/15/84	\$7,192.12
Less 1983 overpayment (4/15/84)	<u><155.00></u>
Balance after 1983 overpayment	\$7,037.12
Interest 4/15/84 to 4/15/86	<u>1,535.07</u>
Total 1976 due 4/15/86	\$8,572.19
Less 1985 overpayment (4/15/86)	<u><26.28></u>
Balance after 1985 overpayment	\$8,545.91

35. *The Division's accounting reflects continued applications of petitioners' overpayments for the years 1980, 1981, 1982, 1983 and 1985, against petitioners' outstanding unsatisfied liability for 1976, including penalties and interest. Interest is computed from 4/15/84 to 4/15/86 to reflect the existence of a liability asserted by the Division for the year 1984. That is, interest was calculated on the unpaid 1976 liability for this two-year period because there was no 1984 overpayment available to reduce such liability. Hence, the next available overpayment to apply against the outstanding 1976 liability was the overpayment for the year 1985, applied as of the due date for petitioners' 1985 return (i.e., 4/15/86). Similarly, as shown below, interest on the outstanding unpaid liability for 1976 is computed from 4/15/86 to 4/15/88 because there was no overpayment for 1986 available to reduce the unpaid liability. The next available overpayment to reduce such liability is the overpayment for 1987 (\$81.77) applied as of the 4/15/88 due date for petitioners' 1987 return. In this manner, the Division's accounting continues to apply overpayments, as of the due date for the return for the particular overpayment year, against petitioners' outstanding liability for the year 1976.*

⁷As of 9/1/83, Tax Law § 684 allowed interest to be computed on outstanding amounts of tax, penalty and interest due, rather than only on outstanding tax liability, as had previously been the case. Accordingly, where the interest amount in the Division's accounting is followed by the parenthetical notation "tax only", the interest base reflects the amount of outstanding tax liability, reduced by the amount of available overpayment. Thus, interest was calculated for the period 4/15/81 to 4/15/82 on an outstanding tax liability of \$3,720.87, computed as petitioners' 1976 tax liability of \$4,394.70 less the \$673.83 overpayment balance for 1980. In the same manner, the resulting reduced 1976 tax liability of \$3,720.87 was again reduced by application of petitioners' \$1,010.00 overpayment for 1981 (applied as of the 4/15/82 due date for the 1981 return), to arrive at an outstanding tax liability of \$2,710.87. Finally, the resulting reduced 1976 tax liability was again reduced to \$2,559.89 in the same manner by the \$155.00 overpayment for 1982.

1986 Balance due and paid/No overpayment	<u>0</u>
Balance 4/15/86	\$ 8,545.91
Interest 4/15/86 to 4/15/88	<u>1,265.58</u>
Total 1976 due 4/15/88	\$ 9,811.49
Less 1987 overpayment (4/15/88)	<u><81.77></u>
Balance after 1987 overpayment	\$ 9,729.72
Interest 4/15/88 to 4/15/89	<u>743.44</u>
Total 1976 due 4/15/89	\$10,473.16
Less 1988 overpayment (4/15/89)	<u><297.00></u>
Balance after 1988 overpayment	\$10,176.16
Interest 4/15/89 to 6/20/97	<u>9,179.29</u>
1976 Balance due 6/20/97	\$19,355.45

36. *The foregoing presentation shows that the Division has applied petitioners' overpayments as soon as they became available against petitioners' outstanding liabilities, starting with the oldest liability (1975) and working forward. According to the Division's computations and accounting, the overpayments set forth above and applied as of the due date for petitioners' return for each of the overpayment years against petitioners' outstanding liabilities for 1975 and 1976, including penalties and interest, were not sufficient to extinguish such liabilities. Although the Division has asserted a liability for 1984, as noted, there were no outstanding overpayments available to apply against such liability, and as set forth below, the 1984 liability, including penalties and interest, was added to the remaining unsatisfied liability*

for 1976 to arrive at the Division's computation of petitioners' liability as of the June 20, 1997 date of the hearing.

1984 Tax Due	\$ 168.82
Penalty	42.21
Interest 4/15/85 to 6/20/97	<u>272.76</u>
Total due 6/20/97	\$ 483.79
Total 1976 and 1984 due as of 6/20/97	\$19,839.24

37.

THE FISHER REPORT

	<i>Refunds Owed By Tax Dept.</i>	<i>Taxes Owed By Petitioners</i>	<i>Running Total</i>
1975 tax due	\$	\$ 659.00	\$
Interest		<u>744.00</u>	
Total		\$1,403.00	
1976 tax due		4,394.00	
Interest		<u>4,690.00</u>	
Total		\$9,084.00	
Balance			\$10,487.00
Less 1977 refund	< 745.00>		
Less 1977 refund interest	<u>< 751.00></u>		
Total refund due	<\$1,496.00>		
Balance			\$ 8,991.00
Less 1979 refund	< 57.00>		
Less 1979 refund interest	<u>< 56.00></u>		
Total refund due	<\$ 113.00>		
Balance			\$ 8,878.00
Less 1980 refund	< 874.00>		
Less 1980 refund interest	<u>< 727.00></u>		
Total refund due	<\$1,601.00>		
Balance			\$ 7,277.00
Less 1981 refund	< 1,010.00>		
Less 1981 refund interest	<u>< 783.00></u>		
Total refund due	<\$1,793.00>		
Balance			\$ 5,484.00

Less 1982 refund	< 151.00>	
Less 1982 refund interest	< 109.00>	
Total refund due	<\$ 260.00>	
Balance		\$ 5,224.00
Less 1983 refund	< 155.00>	
Less 1983 refund interest	< 102.00>	
Total refund due	<\$ 257.00>	
Balance		\$ 4,973.00
Less 1984 refund	< 282.00>	
Less 1984 refund interest	< 205.00>	
Total refund due	<\$ 487.00>	
Balance		\$ 4,486.00
Less 1985 refund	< 226.00>	
Less 1985 refund interest	< 125.00>	
Total refund due	<\$ 451.00> ⁸	
Balance		\$ 4,035.00
Less 1988 refund	< 2,297.00>	
Less 1988 refund interest	< 932.00>	
Total refund due	<\$ 3,229.00>	
Balance		\$ 806.00

Maximum Possible Tax Liability as of June 20, 1997: \$806.00.

38. Petitioners' accounting differs in several aspects from the Division's accounting. For example, petitioners do not include penalties for any of the years in which the Division has asserted penalties are due (i.e., 1975, 1976 and 1984). Petitioners' accounting also reflects 1984 as a refund year, rather than as a liability year, and also includes the higher overpayment amounts claimed by petitioners as due for the years 1985 and 1988. Attached to the Division's accounting are detailed computations of interest amounts, including the rates used and the specific time periods for which such rates were applied. In contrast, petitioners' accounting does not specify

⁸It would appear that petitioners' accounting includes a mathematical error with regard to 1985. Specifically, petitioners' sum the refund (\$226.00) and interest (\$125.00) amounts shown for such year as equalling \$451.00, instead of the \$351.00 correct sum of such amounts. Hence, petitioners' "running total" liability, if accepted as correct on the law, would nonetheless be understated by \$100.00.

the interest rates or the periods used in calculating interest on the 1975 and 1976 tax liabilities or in calculating “refund interest.” It appears, however, as though petitioners may have calculated such interest on each of the discrete yearly individual amounts of tax liability or refund, from such year through to the June 20, 1997 hearing date. However, it is not specified that such amounts were calculated starting with the due date for the return for each of the particular years (i.e., as of April 15 of the succeeding year in each case), or from some other date nor, without some indication of the interest rate used, is it possible to determine whether such is the case. The main distinction between petitioners’ accounting and the Division’s accounting, however, is that the Division’s accounting applies overpayments (refunds), as of the date they would have first become available, in reduction of petitioners’ outstanding liabilities for years prior to such overpayments, whereas petitioners’ accounting calculates interest on such refunds through the hearing date, and then reduces the accumulated total of tax liability, including interest thereon through the hearing date, by the amount of such refunds, including interest thereon. In (simpler) terms of impact, the Division’s method of applying (or using) the overpayments immediately as they became due against the outstanding existing tax liabilities does not provide for any accrual of interest on the overpayments, but rather reduces such tax liabilities and hence the base against which interest on the unpaid liabilities continued to accrue.

CONCLUSIONS OF LAW

A. As is explained hereafter, the only years over which there is jurisdiction to address the substantive merits of petitioners’ challenge are 1977 and 1984. That is, petitioners have timely challenged the Division’s April 1, 1981 disallowance of a portion of their claimed overpayment (refund) for 1977, and have also timely challenged the Division’s December 7, 1987 Notice of Deficiency asserting tax, penalty and interest for 1984. While this determination discusses other

years, it is only for the purpose of addressing petitioners' claims regarding the impact of overpayments for such other years on the application of the overpayment (refund) claimed for 1977 and on the paid or unpaid status of the asserted deficiency for 1984.

B. The year 1977 will be treated first. Petitioners seem to claim, notwithstanding the information set forth on the Fisher Report, that they are entitled to the full \$1,301.10 overpayment amount shown on their return for such year, rather than the \$745.88 overpayment allowed by the Division as the result of the June 1, 1988 conciliation conference. The Division arrived at the \$745.88 overpayment amount after accepting that \$2,800.00 out of \$5,675.00 in claimed Schedule C business expenses, which were initially disallowed entirely upon audit, had been substantiated by petitioners at the conference. Petitioners have made various statements regarding such claimed expenses, including: a) the claim that these expenses were incurred by Mr. Fisher in connection with his business Fisher Associates, and that the same should not be disallowed simply because this business did not generate any income for 1977; b) the claim that petitioners believed the entire amount of such expenses had been allowed at conference and that petitioners were surprised to learn shortly prior to hearing that only half of such claimed expenses had been allowed; c) that petitioners did not know which particular expenses had been allowed as substantiated at conference, were therefore unable to know which expenses remained unsubstantiated, and hence did not know what specific substantiation to present at hearing to prove the validity of their claimed expenses and, d) that due to the passage of time, petitioners were unable to substantiate that the expenses had been incurred.

C. Petitioners' various claims regarding the disallowed expenses for 1977 are rejected. First, as the party claiming the benefit of an expense (i.e., a deduction), petitioners were obliged to substantiate entitlement to the amounts so claimed (Tax Law § 689[e]; *see, Matter of Grace v.*

New York State Tax Commn., 37 NY2d 193, 371 NYS2d 715). Here, the record contains no evidence substantiating the assertion that the various expenses set forth on Schedule C had in fact been incurred, or that such expenditures were legitimately deductible business expenses. It may be presumed that by accepting a portion of the claimed expenses, the Division was willing to recognize the validity of the business Fisher Associates, thus leaving petitioners only to substantiate that the expenses were in fact incurred. Unfortunately, while stating the claim that the expenses were in fact incurred (*see*, Finding of Fact “3”), petitioners have submitted no documents in substantiation of such claim. In sum, there is no evidence in the record to support a conclusion that all of the claimed expenses were in fact incurred or were all legitimate business expenses. As noted, petitioners have argued that they thought the entire amount of Schedule C expenses had been allowed at conference. However, the November 4, 1988 conference order specifically indicates an overpayment (refund) amount which is less than the full overpayment amount claimed by petitioners on their return. At the same time, it is clear and undisputed that restoring the *entire* overpayment amount turns solely on accepting the *entire* amount of disallowed Schedule C expenses. Since less than the full amount of overpayment was allowed per the conference order, petitioners can not reasonably claim to have believed that the full amount of claimed expenses had been allowed at the conference. In this regard, petitioners challenged the November 4, 1988 conciliation order by a petition dated January 27, 1989 seeking, *inter alia*, the full overpayment amount and complaining of the conciliation conferee’s failure to have considered all evidence regarding their claimed expenses (*see*, Finding of Fact “18”). This challenge itself contradicts the argument that petitioners believed all of the expenses had been allowed at conference. Finally, as to the question of which particular expenses were (or were not) allowed at the conference and as to the passage of time argument, the only issue for

1977 has been that of business expenses denied on audit. This has always been the only substantive issue for 1977. Since petitioners protested and thus put the matter of expenses disallowed specifically at issue from the outset, it is only reasonable to expect that petitioners would have saved *all* of their substantiating documents and presented the same at hearing. In fact, it appears that petitioners had at least some proof in substantiation of the claimed expenses as late as June 1, 1988 when the conciliation conference was held. In any event, petitioners have presented no evidence in substantiation of a greater amount of claimed Schedule C expenses than was allowed at the conference. As a result, petitioners have not established entitlement to the full overpayment (refund) claimed on their return for 1977. Accordingly, petitioners' claim for the full overpayment is denied, and the amount of \$745.88 (\$245.88 determined upon audit after initial disallowance of the entire amount of claimed expenses, plus \$540.00 allowed thereafter based upon substantiation presented at conference) is the amount of petitioners' overpayment for 1977.

D. Treated next is the issue of whether petitioners overpaid their liability by the amount of \$282.00 for 1984, as claimed, and do not owe a liability of \$168.82, plus penalty and interest, as determined by the Division. As detailed, petitioners filed two returns for 1984, pertaining respectively to their period of residence and their period of nonresidence during such year. Petitioners calculated their tax liability on the amount of New York taxable income computed on each of such individual returns, and then combined the results to arrive at the claimed \$282.00 overpayment. In contrast, the Division totaled the amount of New York taxable income on each of such returns, and thereafter computed petitioners' 1984 tax liability on such combined amount of taxable income to arrive at the asserted tax deficiency of \$168.82. In short, the Division's computation based on the combined amount of taxable income resulted in a higher tax liability.

E. There is no question that petitioners' manner of filing for 1984, i.e., submitting two returns for the year, was correct. Rather, the only issue raised concerns the proper method of computing the amount of tax due in circumstances where taxpayers (such as petitioners) were residents of New York for a portion of the year and nonresidents for a portion of the year, and were therefore required to file two returns. On this issue, Tax Law former § 654(d), as in effect for the year 1984, provided as follows:

Minimum tax.-Where two returns are required under this section, the total of the taxes due thereon shall not be less than would be due if the New York taxable incomes reportable on the two returns were includible in one return.

In light of former section 654(d), it is clear that the Division properly recomputed petitioners' liability for 1984 by combining the amount of New York taxable income from each of petitioners' returns and computing tax on such combined amount, rather than by computing their tax based on the individual amounts of taxable income on each of such returns. Accordingly, the Division correctly denied petitioners' claim of an overpayment (refund) of \$282.00, and instead imposed tax due in the amount of \$168.82 for 1984.

F. As noted, petitioners raise no apparent dispute against the amount of their tax liability for 1975 and 1976. On this score, the liability for 1975 was the subject of a hearing which resulted in a Tax Commission decision sustaining such liability, including penalties (*see*, Finding of Fact "7"). In turn, since no timely appeal was taken against this decision, the liability became final (*see*, Tax Law former § 690[e]). Furthermore, because the liability for 1976 was simply the amount of tax calculated and reported by petitioners on their return for such year, with no adjustment thereto by the Division, such amount was an assessment of tax upon the filing of the return and there is in fact no jurisdiction here to address such assessed liability (*see*, Tax Law

§ 682[a]; § 692[b]).⁹ Petitioners have, however, argued that the Division was late in crediting petitioners' overpayments against their liabilities (or in paying over refunds) for a number of years, and that therefore any penalties against petitioners based on late filing of returns or payment of taxes for any years, including 1975, 1976 or 1984, should be abated. Alternatively, petitioners argue that if penalties for their late filings or payments are sustained, the Division should likewise be penalized for its alleged lateness in crediting overpayments or paying over refunds to petitioners.

G. As detailed above, there is no jurisdiction in these proceedings to address petitioners' liabilities for either of the years 1975 or 1976. Furthermore, even if there was jurisdiction to address such years, petitioners have offered no explanation or reasons for their admitted late filing and payment for either of these years, or for 1984, a year over which jurisdiction exists in these proceedings. With specific regard to 1984, petitioners have claimed that any calculation error was simply the result of inadvertent mistake (*see*, Finding of Fact "26"). This explanation might suffice to excuse a penalty imposed for underpayment of tax. However, the penalty imposed for 1984 is a late filing penalty, and petitioners have provided no excuse for their late filing. Petitioners' 1984 returns were not filed until October 1986, which is some one and one-half years after the April 15, 1985 due date for such returns without filing extensions. Even assuming petitioners received two filing date extensions, thus leaving their 1984 returns due by October 15, 1985 (and there is no evidence or claim in this regard), it remains that their returns for 1984 would have been filed one year late at a minimum.

⁹In this regard, there is no claim or evidence that petitioners paid such self assessed liability and, within two years after payment, filed a claim for refund of such payment thereby opening the possibility for a hearing upon the Division's denial of such refund claim (*see*, Tax Law §§ 687, 689).

In addition, the request to penalize the Division if penalties are upheld against petitioners is rejected. There is no authority in the Tax Law, or elsewhere, under which penalties may be imposed against the Division based on its alleged late crediting of overpayments (or late payment of refunds) for any of the years discussed in these proceedings. In sum, there is no jurisdiction to address petitioners' liabilities for 1975 or 1976, and, even assuming jurisdiction existed, there is no argument or evidence from which to conclude that such liabilities, including penalties for either of such years, or penalty imposed for 1984, should be abated because petitioners' late filing for any of such years was the result of reasonable cause and not willful neglect.

H. It is thus concluded that the Division: a) properly reduced the amount of petitioners' claimed overpayment for 1977; b) properly denied petitioners' claimed overpayment for 1984 and instead imposed tax, penalty and interest for such year; and, c) that there is no jurisdiction to address the merits of the liabilities for 1975 and 1976. The next issue to be resolved is the impact of the Division's application of petitioners' overpayments (for 1977 [as reduced] and for other years) against petitioners' outstanding liabilities. The argument in this area consists of two parts: 1) the apparently disputed dollar amounts of the overpayments for the years 1985 and 1988 (*see*, Finding of Fact "27") and, 2) the propriety of the manner in which the Division has accounted for and applied petitioners' overpayments (as set forth in the Eckler Report) versus petitioners' accounting and application of such overpayments (as set forth in the Fisher Report).

I. The Division believes petitioners made overpayments in the amounts of \$26.28 for the year 1985 and \$297.00 for the year 1988. With regard to 1985, the Division's witness (Mr. Eckler) explained that Division computer records indicate that petitioners overpaid and were entitled to a refund for such year in the amount of \$26.28. According to a computer transcript of petitioners' filing for 1985, a refund amount of \$26.28 was allowed. While the transcript

indicates a refund number representing a refund check, the Division was unable to state with certainty that such amount had been issued as a check to petitioners, or had been allowed as a credit against petitioners' liabilities. Accordingly, the Division's accounting (the Eckler Report) allows such amount and credits the same against petitioners' outstanding unpaid liabilities.

For 1988, the Division's assessments receivable computer transcript reflects a \$297.00 refund offset, effective October 9, 1989 and posted January 22, 1990, against petitioners' 1976 liability. At the hearing, Mr. Eckler testified that such amount represented an income tax overpayment for tax year 1988 which was applied by the Division on October 9, 1989 as a reduction or offset against petitioners' outstanding liability for 1976. Reference to the Division's accounting (the Eckler Report) reveals that in such accounting, the Division has applied the 1988 overpayment against petitioners' outstanding 1976 liability as of the earlier April 15, 1989 due date for petitioners' 1988 return, rather than on October 9, 1989 as originally applied. In sum, the Division's accounting sets forth the amounts of the overpayments the Division believes are correct for 1985 and 1988 based on its records and the testimony of its witnesses explaining such records.

J. Petitioners, in response to the Division's position, provided no evidence in support of their claim, set forth in the Fisher Report, that the correct amounts of refund are \$226.00 for 1985 and \$2,297.00 for 1988. Rather, petitioners seem to argue that the Division never previously advised petitioners of the existence or amounts of such overpayments. While making the general assertion that they are owed "thousands" in refunds which should offset any unpaid liabilities, and while claiming the larger amounts of overpayment for 1985 and 1988, petitioners have provided no basis to support a conclusion that the Division's amounts for 1985 and 1988 are in error as to amount, or that petitioners' amounts should be accepted as correct. Again, in this

regard, petitioners bear the burden of establishing entitlement to the overpayments claimed, and of establishing the dollar amounts thereof. Petitioners have offered no tax returns showing different amounts than those set forth by the Division, nor any other evidence to support a claim that the Division's overpayment amounts are in error, or that any additional overpayments exist for the noted years which have not been accounted for by the Division. Accordingly, it follows that petitioners have not established entitlement to overpayments for 1985 or 1988 in amounts greater than those allowed per the Division's documentary evidence. Thus, the overpayment amounts for 1985 and 1988 are \$26.28 and \$297.00, respectively.

K. Finally, there is the question of the propriety of the Division's application of petitioners' overpayments. This issue becomes relevant because of the impact of such application on the dollar amount of the liabilities owed by petitioners. The Division's authority to apply overpayments against outstanding liabilities is found in Tax Law § 686(a) which provides, in relevant part, as follows:

General.- The tax commission, within the applicable period of limitations, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the tax commission . . .

L. With respect to the issue of interest, Tax Law § 684(a) provides for the imposition of interest on underpayments of tax, at the rate of not less than six percent per annum as determined pursuant to Tax Law § 697(j) and 20 NYCRR 2393, with such interest computed from the due date for payment of the tax until its payment. For purposes of assessment, collection and

payment, such interest, as well as any additions to tax or penalties, are to be treated as tax (Tax Law § 684[g]; § 685[l]).¹⁰

In similar fashion, Tax Law § 688(a) provides for the allowance of interest, at the rate of not less than six percent per annum as determined pursuant to Tax Law § 697(j) and 20 NYCRR 2393, on overpayments of tax. However, Tax Law § 688(a)(1) limits the amount of interest to be paid on overpayments by providing that such interest is payable “from the date of the overpayment to the due date of an amount against which a credit is taken.” Under Tax Law § 688(a)(1), if the due date for an amount of tax against which an overpayment is applied *precedes* the date of such overpayment, then no interest is payable on the overpayment. In plain terms, preexisting liabilities against which later overpayments are applied as credits serve to absorb or use up such later overpayments, thus leaving no overpayments upon which to compute interest. This limitation is consistent with Tax Law § 684(n), which provides that:

Satisfaction by credits.-If any portion of a tax is satisfied by credit of an overpayment, then no interest shall be imposed under this section on the portion of the tax so satisfied for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment.

Again, in plain terms, under section 684(n) no interest may be imposed on an underpayment of tax after, and to the extent that, such underpayment is satisfied by application of an overpayment against it.

M. It is clear that pursuant to Tax Law § 686, the Division is entitled to utilize an overpayment of tax liability for any year as a credit or offset against any underpayment of tax liability, including (as here) any prior years’ unsatisfied underpayments of tax liability (*see, Gura v. State*, 121 Misc 2d 423, 467 NYS2d 743). The Eckler Report sets forth the Division’s

¹⁰As noted, prior to September 1, 1983, interest was allowed to accrue only on unpaid outstanding tax amounts and not on penalties and interest.

manner of accounting for a) petitioners' liabilities based on underpayments for 1975, 1976 and 1984 and, b) the Division's applications of petitioners' overpayments for the years 1977, 1980, 1981, 1982, 1983, 1985, 1987 and 1988 as credits against such liabilities. Careful review of this accounting confirms its compliance with the terms of the foregoing statutory standards regarding underpayments, overpayments, applications of such overpayments as credits against underpayments, and the imposition and allowance of interest with respect thereto. More specifically, the Division's accounting applies petitioners' overpayments as credits against petitioners' unpaid liabilities at the earliest possible overpayment date, i.e., the due date for the overpaid return for the particular tax year, regardless of the date on which the return may have actually been filed. In effect, this manner of applying overpayments serves to reduce the amount of the underpayment (liability) at the earliest possible date, thus minimizing the remaining unpaid liabilities (the base) upon which interest accrues until the next overpayment to be applied becomes available. This crediting of overpayments eliminates the accrual of interest on the portion of the liabilities against which the overpayment is credited, as required under Tax Law § 684(n).¹¹

N. Petitioners complain that the Division's accounting does not reflect any accrual of interest on petitioners' overpayments. However, by applying or using petitioners' later year overpayments, as soon as they became available, as credits against petitioners' earliest unpaid liabilities, the Division is not required to pay interest on such overpayments (Tax Law

¹¹The Division has applied the overpayments as of the due date for the return for each overpayment year without regard to the actual date on which the return was filed. Tax Law § 688(a)(3) precludes payment of interest on overpayments, in the case of late filed returns, from the due date for the return until the date on which the return is filed. The Division's accounting which applies the overpayments as of the due dates of the returns instead of as of their dates of actual filing, notwithstanding that certain returns were concededly late filed, appears to reflect a concession (beneficial to petitioners) that the Division was unable (or unwilling) to specify the exact (late) date on which such returns were in fact filed.

§ 688[a][1]) and, consistently, is precluded from imposing interest on such liabilities to the extent they have been reduced by the overpayments applied (Tax Law § 684[n]). At the same time, however, since the overpayments were not sufficient at any point to eliminate, in total, petitioners' preexisting liabilities, the Division was entitled to continued accrual of interest on the unsatisfied liability balance (Tax Law § 684[a]). The Eckler Report clearly shows the timely application of petitioners' overpayments against their liabilities at the earliest possible date. The Division included with its accounting the method of calculation by which interest was computed on the existing unpaid liabilities, including the fact that interest was calculated only on petitioners' unpaid tax liability (i.e., excluding penalty and interest amounts) for periods prior to September 1, 1983. Simply put, petitioners are not entitled to interest on overpayments which are applied, as soon as they become available, against prior outstanding unpaid liabilities. The accounting in the Eckler Report follows this procedure.

O. Petitioners' Fisher Report, in contrast, does not account for the imposition of penalties herein upheld, treats 1984 as an overpayment year rather than a liability year, and reflects much greater overpayment amounts for 1985 and 1988 than those determined herein. Moreover, petitioners' accounting computes interest on both the unpaid liabilities owed by petitioners and on the overpayments by petitioners, apparently from the tax year of the underpayment or overpayment, respectively, to the June 20, 1997 date of the hearing, and then offsets such total unpaid liabilities by each total overpayment (including interest thereon) on a running yearly basis. This method of accounting is rejected in light of Tax Law § 686, which supports the Division's authority to utilize any overpayment as a credit against any outstanding liability, and in light of Tax Law § 688(a)(1) which precludes interest on overpayments which have been used (or used up) as credits against prior period underpayments.

P. Petitioners' accounting, while far more favorable in outcome to petitioners, nonetheless results in an unpaid liability owed by petitioners. More importantly, however, the method and amounts employed in this accounting are simply not consistent with the Tax Law or with the conclusions reached herein. In this regard, the lesser final liability shown on the Fisher Report results, in large part, because of the differences in certain underlying assumptions and dollar amounts used, as described in Finding of Fact "38". That is, the Fisher Report eliminates all penalties, treats 1984 as an overpayment year instead of an underpayment year, and includes overpayments for 1985 and 1988 which together total \$2,200.00 more than the correct total amounts of the overpayments for such years (*see*, Conclusions of Law "I" and "J"). Further, the Fisher Report includes the accrual of interest on all of the overpayments. However, as explained above, by applying the overpayments when they first become available, as offsets, the Division is not required to pay interest on the overpayments and can not impose interest on the liability amounts being offset. Stated directly, the Division saved petitioners the interest costs on their underpayments to the extent of the overpayments available and applied. The fact that petitioners' later years' overpayments were insufficient to extinguish petitioners' prior year liabilities, thus leaving unpaid liabilities against which interest continues to accrue, does not impair the validity and correctness of the Division's accounting or provide any basis to support acceptance of petitioners' accounting as correct.¹²

¹²It may be that some of the apparent confusion results from the use of the term "refund". In this case, petitioners made "overpayments" for a number of years. Overpayments can become refunds, and the Division must pay interest on an overpayment if it is not refunded within three months of the later of the tax return due date or the actual return filing date (Tax Law § 688[a][c]). However, the Division has clear authority, under Tax Law § 686, to apply overpayments as credits against underpayments of tax. Petitioners have spoken of their "refunds" yet, because of petitioners' prior years' underpayments, the Division was authorized to apply petitioners' overpayments as credits, and petitioners were thus not automatically entitled to receive their overpayments as refunds. In sum, the Eckler Report makes no late applications of overpayments as credits, and petitioners are thus not entitled to interest on such overpayments as applied.

Q. Finally, petitioners complain that the Eckler Report was not made available to them prior to the hearing, and thus argue they were unable to prepare for and refute the report. It is true that the Eckler Report was not prepared until the evening of the first day of hearing, and was not offered until the second day of hearing. However, it was prepared at the request of the judge, near the close of the first day of hearing, as a summary of the Division's position vis-a-vis amounts, applications and impact of petitioners' overpayments. It is based on the evidence the Division offered at hearing regarding the dollar amounts of petitioners' overpayments and underpayments for the various years. The dollar amounts of petitioners' overpayments for all but two of the overpayment years are not disputed (*see*, Findings of Fact "13", "29", and "33 through "37"). In addition, petitioners have offered nothing to affirmatively support their claims on the substantive issues in this case, or to support any changes to the amounts of the overpayments reflected in the Eckler Report. With specific regard to the substantive issues, petitioners have offered no substantiation for the claimed business expenses disallowed for 1977, nothing to establish that their computation of their 1984 tax liability (resulting in an overpayment) was correct, and no excuse for the late filing of their 1984 returns. These are the substantive issues which were raised by petitioners and which have been in this case from the outset. Petitioners were advised at hearing, and in correspondence between the parties in the years prior to hearing, to provide any evidence they had in support of their claims, including specifically any evidence supporting overpayments (refunds) they believed they were entitled to in amounts different from or in addition to those overpayments identified by the Division. Petitioners have pointed to no unaccounted for overpayments, and instead only questioned the amount of the overpayments for two years, 1985 and 1988. Petitioners should, as the party claiming an overpayment, be in the best position to establish the amount of the overpayment they claim to have made. However,

petitioners' challenge to such overpayment amounts for 1985 and 1988 consists only of their bare allegation that the amounts should be higher than allowed by the Division, with no supporting substantiation for such allegation.

R. It is true that a great deal of confusion has surrounded this matter over the years, specifically concerning the issue of the correct accounting for overpayments. However, while the Division has admitted to previous accounting errors and administrative errors, the same in no way entirely accounts for the passage of time or confusion in this case. The time element must be balanced against the fact that petitioners' filed their returns late for a number of years, and in light of the default in appearance at the prehearing conference scheduled for May 1982. In any event, petitioners have been afforded a proper accounting of the application of their overpayments, as requested (*see*, Finding of Fact "19"), and the impact of such application on their outstanding prior year' liabilities. Against this entire background, it cannot be said that petitioners have been denied equal protection of the law because the Division has not been subject to penalties in this matter. Finally, petitioners' argument that they have been denied due process of law because the hearing in this case was not postponed to a date other than June 19, 1997 is rejected, as is their claim that they were denied due process of law because they were not granted a new hearing as requested in their September 29, 1997 motion. On this latter point, the basis for denial of a new hearing is set forth and preserved in the Order dated January 29, 1998.

S. The petition of Stephen and Nanci Fisher is hereby denied; the April 1, 1981 denial of a portion of petitioners' claimed overpayment and refund for 1977, as subsequently adjusted, and set forth in BCMS Order No. 34013 dated November 4, 1988, is sustained; and the Notice of Deficiency dated December 7, 1986 pertaining to the year 1984, together with penalty and interest thereon, is sustained.

DATED: Troy, New York
October 22, 1998

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE